Supreme Court, U.S.
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No. 98-1313

In The

Supreme Court of the United States

October Term, 1998

VERONICA L. DAVIS,

Petitioner,

vs.

SYNTEX LABORATORIES, INC.;
ROCHE BIOMEDICAL LABORATORIES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the District Court err in dismissing Petitioner's claims with prejudice for repeated and willful refusals to comply with its orders, after giving Petitioner multiple opportunities to comply and repeatedly warning Petitioner that a failure to comply would result in dismissal?

2. Did the Fifth Circuit err by not requiring the recusal of the District Court or by affirming the District Court's taxation of costs against Petitioner?

PARTIES TO THE PROCEEDING

Petitioner's statement regarding the parties to the proceeding needs to be corrected in one respect. Petitioner originally sued Syntex Laboratories, Inc. and "Roche BioSciences, Inc." alleging that Roche BioSciences was the owner or a subsidiary of Syntex Laboratories, Inc. The caption in Petitioner's original complaint, however, listed the defendants as Syntex Laboratories, Inc. and "Roche BioMedical." The original complaint was never served. Petitioner filed an amended complaint with Syntex Laboratories, Inc. and Roche BioSciences, Inc. listed in the caption. The correct respondent in this case is Syntex (U.S.A.), Inc., the successor to Syntex Laboratories, Inc. There is, however, no issue in this proceeding concerning whether Petitioner sued the correct defendant or defendants.

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BRIEF IN OPPOSITION

The Respondent, Syntex (U.S.A.), Inc., sued as Syntex Laboratories, Inc., and Roche BioSciences, Inc. (hereafter "Respondent"), respectively requests that this Court deny the petition for writ of certiorari in this case. The opinion of the Fifth Circuit affirming the dismissal of Petitioner's claims is unpublished, but is attached as Appendix 2 to the Petition.

STATEMENT OF JURISDICTION

Petitioner's statement of jurisdiction needs to be clarified, or at least modified, in several respects.

Petitioner's claims were dismissed by the District Court for the repeated and willful failure to comply with the District Court's Orders. The District Court also taxed costs against Petitioner. Petitioner argued on appeal in the Fifth Circuit that both the Order dismissing her claims with prejudice and the Order taxing costs against her were abuses of discretion. At no time, however, did she raise any claim that the District Court's actions amounted to violations of her rights under the First, Seventh, or Fourteenth Amendments to the United States Constitution. Although the District Court did not specify the basis for its order of dismissal, the dismissal was authorized by Federal Rule of Civil Procedure 37(b)(2)(C) and 41(b) as well as the District Court's inherent powers. Nothing in the record implicates any constitutional provisions or the Enabling Act for the Federal Rules of Civil Procedure, 28 U.S.C. § 2072.

STATEMENT OF THE CASE

The District Court dismissed Petitioner's claims because of her repeated, intentional failures to comply with its Orders, and the Fifth Circuit affirmed on that same basis. Pet.'s App. at 3-4.[1] There can be no doubt, however, that Petitioner was well aware of the District Court's authority to control the timing and sequence of discovery and to manage its docket and of the penalties for repeatedly and willfully violating the District Court's Orders. Petitioner is a licensed attorney, and was plaintiff-appellant's counsel in *Woodson v. Surgitek, Inc.*, 57 F.3d 1406 (5th Cir. 1995), in which the Fifth Circuit affirmed the district court's dismissal of the plaintiff-appellant's claims based on Petitioner's similar refusals to follow the district court's orders. (*See* Pet.'s App. 2 at 3-4).

This is a pharmaceutical products liability case. Petitioner alleges that she took the prescription drug Synarel from November 1993 until March 1994,[2] and that nine months later, she experienced a fainting spell at work and was subsequently diagnosed (about one month later) with a pituitary macroadenoma. At the first status conference on June 9, 1997, the District Court ordered Petitioner to produce her medical records and produce an expert

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[1] The petition for writ of certiorari in this case is referred to as "Pet. at ___." References to documents attached to the appendix to the Petition, including the Fifth Circuit's unpublished opinion, which is attached as Appendix 2 to the Petition, are referred to as "Pet.'s App. at ___."

[2] During the relevant time period, Synarel was manufactured by Syntex (U.S.A.), Inc., hereafter referred to as "Respondent." Syntex (U.S.A.), Inc. has appeared in this case.

report by June 30, 1997. (Pet.'s App. at 6). Petitioner did not initially challenge either aspect of this Order. Instead, she agreed to execute a medical records release and requested an extension until September 5, 1997, the Friday before the next status conference, to provide an expert report – representing to the District Court that she had retained an expert. (App. at 2-3).[3]

Petitioner did not produce any medical records, execute a release, or produce an expert report. Instead, she recanted her previous representations, stating that she had not been able to retain an expert and arguing that she should either not be required to produce an expert report or be given more time to retain an expert. (App. at 6). The District Court rejected these arguments, and ordered Petitioner to comply, but Petitioner refused.

Instead, Petitioner produced a handful of medical records and filed motions seeking to set aside the District Court's order, to compel production of documents from Respondent, and for a protective order concerning her medical records. (Docs. 13-15, 21-23).[4] A hearing was held

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[3] Citations to the appendix to this Opposition are referred to as "App. at ___."

[4] The appeal in the court below was handled under an experimental procedure whereby the record was not sequentially numbered and provided to all counsel. Instead, counsel were instructed to cite to the District Court record utilizing the District Court's docket entry numbers. Therefore, citations to the District Court record in this opposition follow this same practice. A copy of the District Court's docket sheet is attached as pages 11-19 to the appendix to the Petition. Some citations to the District Court's record that are also included as part of the appendix to this Opposition are referred to as "App. at ___ (Doc. ___)."

on Petitioner's motions. The District Court denied them all, again ordered Petitioner to comply with its orders, and explained in some detail both the substance of its Orders and their rationale. (App. at 11-31 (Doc. 35)). Again, however, Petitioner failed to comply. (App. at 34 (Doc. 26)). She also threatened legal action against the records service retained by Respondent's counsel to obtain her medical records (App. at 35-36 (Doc. 28, Ex. A)) and refused to accept service of Respondent's document subpoenas. (App. at 37 (Doc. 35, Ex. B)).

Subsequently, Petitioner failed to attend a scheduled status conference, despite proper notice, and thereafter failed to attend a hearing set at her request concerning a motion she filed seeking relief from the previous orders of the District Court. (App. at 38-51 (Docs. 31, 46-47)). Given Petitioner's repeated and intentional refusals to follow the District Court's Orders and her affirmative efforts to subvert them, the District Court dismissed her claims and taxed costs against her. The Fifth Circuit summarily affirmed without oral argument and without published opinion.

REASONS THE PETITION SHOULD BE DENIED

I. There is No Reason to Grant the Petition.

There are no "special" or "important" reasons why a writ of certiorari should be granted in this case, and the Court should decline review. *See* Sup. Ct. R. 10. Contrary to Petitioner's assertions, this case does not involve a denial of due process or any other constitutional or statutory violations. Rather, this case is a straightforward

example of the fundamental principal that district courts, not litigants, have the right to control the timing and sequence of discovery. In this case, the record demonstrates that Petitioner willfully failed to comply with the District Court's Orders despite notice, multiple opportunities, and patient explanations from the District Court as to both the meaning and rationale of its Orders. No important issue exists in this case for the Court to decide – the law granting the District Court the authority to control the timing and sequence of discovery and to maintain its docket was correctly applied to the facts of this case by the Fifth Circuit. This Court's review is not warranted.

II. The Fifth Circuit Correctly Applied the Law to the Facts of this Case in Affirming the District Court's Dismissal of Petitioner's Claims.

A. The District Court Properly Dismissed Petitioner's Claims for Repeated and Intentional Failures to Comply with its Orders.

Fed. R. Civ. P. 37(b)(2)(C) & 41(b), as well as district courts' inherent powers, support dismissal for refusal to obey court orders. While this is obviously a severe sanction,

> [t]he most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643 (1976) (per curiam). Petitioner, if anyone, should be aware of the District Court's authority, because, in *Woodson*, the Fifth Circuit affirmed the district court's dismissal of the plaintiff's claims based on Petitioner's similar failures to follow the district court's orders.

In *Woodson*, Petitioner (1) failed to timely designate experts or produce expert reports, arguing that the plaintiff did not have to produce reports that did not exist;[5] (2) failed to produce her client for a court ordered deposition;[6] (3) refused, following settlement, to comply with two court orders to secure a final release of all claims, instead moving to enforce her version of the settlement agreement and for sanctions against the defendants; and (4) failed to appear for a subsequent hearing based on the pendency of a petition for en banc rehearing of a mandamus petition she had filed in the Fifth Circuit seeking recusal of the district judge (which the Fifth Circuit had denied). "Under the circumstances, the district court viewed [Petitioner's] failure to appear as 'yet another obstruction to the progress of this plagued and hostile litigation' "[7] and dismissed the plaintiff's claims with

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[5] 57 F.3d at 1408-09. This argument, which was rejected by the *Woodson* court, is essentially the same as her argument in this case that the District Court could not order her to produce an expert report because it lacked the power to order her to engage in discovery. *See* Pet. at 10, 12.

[6] *Id.* at 1410.

[7] *Id.* at 1415.

prejudice. Petitioner moved for reconsideration, contending that the district court lacked authority to enter the dismissal because of the pending request for en banc rehearing and that the district court had ordered counsel to refrain from filing further pleadings (an order she had ignored). Additionally, as in this case, Petitioner claimed that the district court was biased and demanded recusal. *Id.* at 1415.

On appeal, the Fifth Circuit affirmed the dismissal under the district court's inherent powers based on Petitioner's conduct, including (1) her continued requests for enforcement of her version of the settlement agreement despite the parties' contrary agreement; (2) her representation to the district court that no expert was willing to perform certain medical tests on the plaintiff, despite contrary evidence in the record; (3) her filing of a meritless mandamus petition apparently for purposes of delay; and (4) her failure to appear at scheduled hearings. *Id.* at 1417-18. The court rejected Petitioner's argument that the pendency of a mandamus petition seeking recusal deprived the district court of jurisdiction and justified Petitioner's non-attendance at the hearing. *Id.* at 1416.

1. Petitioner intentionally and willfully failed to follow the District Court's Orders.

Petitioner repeatedly and intentionally failed to follow the District Court's Orders, despite multiple opportunities and multiple warnings that her failure would result in dismissal. The District Court initially ordered Petitioner to (1) "produce all her medical records" and (2) "provide reports from the doctors that can explain the

causal link between the drug and her condition by June 30, 1997." (Pet.'s App. at 6). This Order did not specify the type of expert Petitioner was to obtain or the form the report was to take.

Petitioner did not challenge the District Court's Order, but she did not comply either. She did not produce any medical records between the June 9 conference and the next status conference on September 8, 1997,[8] nor did she provide a release by September 8, even though Respondent's counsel twice sent her releases and requested execution. (Doc. 17, Ex. B; Doc. 35, Ex. D; Doc. 34, pp. 20-21). Petitioner also did not file an expert report by June 30. Instead, she requested an extension until September 5 (the Friday before the next status conference), representing that she had an expert, but that she needed to obtain and provide him with additional documents, including her medical records. (App. at 2-3 (Doc. 9, pp. 1-2)).

On or about July 31, 1997, Petitioner served interrogatories and requests for production, seeking virtually every document in existence concerning Synarel. (Doc. 17, Exs. F & G). Respondent properly objected, but also offered to produce literally thousands of pages of documents from the New Drug Application for Synarel ("NDA"), including documents concerning composition,

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[8] Prior to the June 9 conference, Appellant produced eight pages of medical records: three MRI reports and a five page narrative from a treating physician dated March 3, 1995 stating that Petitioner's fainting at work in January 1995 was not related to her use of Synarel. (Doc. 18, p. 2).

testing, and FDA approval, documents concerning labeling, advertising, and manufacturing, and correspondence with the FDA. (Doc. 17, Exs. I & J). Petitioner never made any attempt to examine these documents.

On September 5, the date Petitioner had specifically requested as the deadline to file her expert report, she instead filed a "Response to the Court's Order to Produce Reports from Doctors," (App. at 5-6 (Doc. 11)), in which she asserted, for the first time, that she should not be required to produce an expert report at all, or, alternatively and contrary to the representations in her motion for extension, that she had not retained an expert and needed additional time to do so. (App. at 6 (Doc. 11, p. 2)).[9] It was only after Petitioner recanted her previous representation that she had an expert and would file a

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[9] Although Petitioner claimed below that she attempted to retain experts, she never submitted anything to the District Court or the Fifth Circuit, either with her September 5 filing or subsequently, to support this assertion. Additionally, the reason proffered for her failure to retain an expert – that all the people she contacted had either worked for Syntex (U.S.A.), Inc. or done research for it (App. at 6 (Doc. 11, p. 2)) – is not only preposterous but also wholly unsupported by the record below. Moreover, even assuming, without any record support, that this is true, Petitioner can point to no rule that would prohibit a former employee or researcher from acting as her expert. Instead, Petitioner makes the bizarre and wholly unsupported claim that there exists a "mandate that researchers for Respondents enter into an agreement in which information about the product Synarel, which is the object of this suit, could not be used in preparing an expert report for any person or party other than Respondents. . . . " There is not a jot of support in the record for this claim, and moreover, it was not raised below in either the District Court or the Fifth Circuit.

report that the District Court, in an attempt to focus Petitioner's attention, ordered Petitioner to "deliver all her medical records to Syntex by noon, Wednesday, 9-17 or her case will be dismissed. . . . " and also ordered her to file an expert report from an endocrinologist concerning causation by October 31, 1997. (Pet.'s App. at 7). There is no merit to Petitioner's repeated complaints that the District Court improperly designated the type of expert she was to retain. Had Petitioner complied with the District Court's original Order as she represented she would, it would never have been an issue.

Following the September 8 conference, at Petitioner's request, Respondent voluntarily provided her with a list of medical records that it had obtained and a list of records it had not obtained. (Doc. 28, Ex. E). On September 17, Petitioner faxed 36 pages of records to Respondent's counsel.[10] (Doc. 18, Ex. A). Instead of producing her other records, she filed a motion for protective order, based on her unsupported assertion that all pre-1993 medical records were irrelevant. (Doc. 15). Astonishingly, Petitioner filed this motion even though she sought medical treatment for symptoms for which she seeks recovery in this case years before she ever took Synarel.[11]

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[10] In correspondence accompanying her September 17 fax, Petitioner claimed that the records were from five health care providers. (Doc. 18, Ex. A). It is impossible, however, to tell from the records faxed whether this is true.

[11] Petitioner claims to suffer, among other things, excess weight gain, body aches and pains, and extreme fatigue as a result of her use of Synarel. (Pet. at 4; Doc. 3, p. 3). In February 1992, Petitioner was seen at a hospital emergency room for chest pain, vomiting, neck pain, leg pain and shoulder pain. Her

Also, despite Petitioner's failure to attempt to examine the thousands of pages of documents Respondent had offered to produce in response to her interrogatories and requests for production, Petitioner filed a motion to compel/motion for sanctions against Respondent, contending that Respondent should have produced voluminous documents, including the entire NDA for Synarel, not only in response to her discovery requests, but as part of Respondent's initial disclosures (without even a formal discovery request) and should be sanctioned for failing to do so. Petitioner also argued, without apparent irony, that Respondent should have designated all its experts and provided expert reports with its initial disclosures. (Doc. 13, pp. 1-2). Petitioner also filed a motion for hearing on the Court's previous Order to produce her medical records, contending that she should be excused from compliance because she had agreed to provide a release, (Doc 14, pp. 1-2), even though she had admittedly failed to timely provide one.

A hearing on Petitioner's motions was set for Friday, October 17, 1997. (Doc. 20). At the hearing, Petitioner served on counsel for Respondent an amended motion for protective order and an amended motion for hearing on the Court's previous Order, essentially reasserting the

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history included a previous accident and a hiatal hernia. Similarly, records dating back to 1986 refer to Petitioner's weight gain and regular use of prescription diet pills and to a 1979 diagnosis of anemia and resulting complaints of fatigue. (Doc. 18, pp. 4-6 & Exs. 3-5). In spite of this evidence, Petitioner continued to assert throughout the proceedings below that all pre-1993 medical records were irrelevant, without ever submitting anything to support her contentions.

same arguments set forth in her original motions. (Docs. 21, 23). Petitioner also served a motion to quash depositions by written questions (App. at 8-9 (Doc. 22)) contending, again with no apparent irony, that Respondent was seeking the production of medical records without a valid medical authorization – notwithstanding that the basis of her motion for relief from the District Court's order to produce medical records was her supposed willingness to provide a release. (Doc. 22, p. 2).

At the hearing, Petitioner reluctantly conceded that she had not complied with the District Court's Orders, even though she knew that the filing of her motions did not toll her obligations. (App. at 11-19 (Doc. 34, pp. 1-10)). She argued, however, that she should be excused from producing any medical records because Respondent was seeking records dating back to her birth. Besides being inaccurate, this argument ignored her failure to timely provide a release and her incomplete production of medical records concerning the conditions alleged in her complaint.

Petitioner also argued that, based on the default provisions of Fed. R. Civ. P. 26, she did not have to produce an expert report until 90 days before trial or, alternatively, that she did not have to produce one until Respondent had produced all the documents she demanded. (App. at 19, 21-22 (Doc. 34, pp. 14, 18)). In rejecting these arguments, the District Court explained, at length, the substance of its Orders and their rationale.

> The reason for case-specific discovery orders is that cases vary a great deal in the

factual context, and there is, as this case illustrates, considerable asymmetry in sources of information.

In a case like this, the plaintiff has unique knowledge that connects her injury to the defendant. This is not a case where the defendant knows how it was driving or how it maintained its truck right before the collision.

The defendant in this case is obliged to make considerable regulatory disclosures, does in fact commercially disclose medical data about the drug, and most of all, has the requirement in this state that there be a licensed medical expert between the sale of the drug and the consumption by the patient.

Under the circumstances of this type case, the discovery is – the information that needs to be discovered is the plaintiff's information.

I have had these kinds of cases where it turned out, when you looked at the medical records, the plaintiff actually didn't take the drug as alleged.

The only way to find out whether there is a connection between the plaintiff's claim of this drug's ill effects is to know the nature of the plaintiff's physical condition, the diagnosis, what was prescribed and when; including the defendant's drug, plus other drugs, because there are positive and negative synergies, although I don't think "synergy" technically should be used in a negative sense.

There are good and bad combinations for drugs, and there are good and bad combinations of symptoms. And most important, every biochemical adjustment of a person has secondary

> consequences that are less than favorable. No medical or chemical intervention does not have side effects. Therefore it is essential in this kind of case, that the defendants know the benefit sought, the benefit achieved, as well as the alleged secondary unfavorable consequences.
>
> The Court has not totally prohibited discovery from the defendant. The Court has made the discovery from the defendant depend upon a proper production by the plaintiff of a connection between her complaint and the defendant's product.[12]

Moreover, the District Court told Petitioner that she could comply with its Order to produce an expert report by submitting a report or affidavit from an expert explaining that he could not render an opinion without first obtaining specific documents from Respondent. The District Court, however, cautioned Petitioner that she could not avoid its Order based solely on her unsupported demands for voluminous document production.

> We have discussed on a couple of occasions that Syntex has a responsibility to respond to a very specific, scientifically based complaint; they do not have the responsibility to disgorge all of their files just because you have made an unsubstantiated complaint against them.
>
> If you can articulate some specific need for some documents that they may have, then I will make them produce them, if I believe the need is genuine. Certainly if one of your science consultants articulates the need for some additional data besides your condition and the history of

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[12] App. at 25-27 (Doc. 34, pp. 25-27).

> what you took when, then I will consider making them respond to it promptly.
>
> But for you to demand wholesale, so far, apparently wholly irrelevant documents from them, while cloaking your medical history, suggests a malicious attempt to have Syntex pay you the value of the transaction cost you're imposing by making the claims in the first place. And that is not why we have lawsuits, so that you can extort a settlement value from them by attrition.[13]
>
> If Syntex has done something wrong, it should compensate you. It is your responsibility as the plaintiff to prove that they did something wrong.
>
> At the moment, we have no evidence that the injury you claim to have suffered is connected with Syntex's product, and that is an essential element of your claim and we are not doing anything else until we know that Syntex has a factual connection to this case.[14]

Additionally, the District Court again cautioned Petitioner, as it had done before, that the failure to comply with its Order would result in dismissal. (App. at 20, 30 (Doc. 34, p. 14, 30). At the conclusion of the hearing, the

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[13] Petitioner cites this reference to "extortion" out of context, in an attempt to suggest bias on the part of the District Court. The record as a whole demonstrates, however, that the District Court patiently allowed Petitioner multiple opportunities to comply with its orders, even in the face of Petitioner's blatant refusals to do so.

[14] App. at 20-21 (Doc. 34, pp. 15-16).

District Court ordered that Petitioner's October 31 deadline for the production of an expert report remained in force. (App. at 28 (Doc. 34, p. 28)). The Court further ordered, at Petitioner's suggestion, that she provide counsel for Respondent a list of her medical providers so that he could obtain the records, with Petitioner to pay the costs of obtaining these records. (App. at 29 (Doc. 34, pp. 29-30)). Petitioner then made an oral motion to recuse, which was denied. (App. at 30-31 (Doc. 34, pp. 30-31)).

Although Petitioner understood the District Court's Orders (App. at 27, 29-30 (Doc. 34, pp. 27, 29-30)), she still did not comply. Instead, on October 21, 1997, she filed a pleading stating that she would not file an expert report or pay for Respondent's cost of obtaining her medical records. (App. at 34 (Doc. 26, p. 2)). Petitioner also threatened the records service hired by Respondent with "**immediate legal action**"[15] if any additional records were obtained or released to Respondent's counsel (App. at 35-36 (Doc. 28, Ex. A)), and refused to accept service of Respondent's notices of these records depositions. (App. 37 (Doc. 35, Ex. B)).[16]

On November 5, 1997, Petitioner filed a written motion to recuse (Doc. 29), which was set for hearing on December 4, 1997 (Doc. 30), along with her motion to reconsider or vacate the Court's Orders of October 17,

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[15] Emphasis in original.

[16] Thus, Petitioner's conduct belies her argument that the District Court erred in ordering her to produce her own medical records because the parties had agreed that Petitioner would provide a release and Respondent would obtain the records.

1997 (Doc. 27), and Respondent's motion to dismiss. (Doc. 28). Another pretrial conference was already set for Monday, November 10, 1997 (Doc. 24; Doc. 34, p. 30). On Friday November 7, 1997, Petitioner filed a "Notice of Nonattendance for Pretrial Conference," in which she stated that "Plaintiff finds that a pre-trial conference would serve no legitimate end." (App. at 38 (Doc. 31, p. 1)). This document was not served on counsel for Respondent until the day of the hearing and was never served on the District Court by Petitioner (a copy was provided by Respondent's counsel and made a part of the record by the District Court). Petitioner did not attend the hearing. (App. at 41-44 (Doc. 46)).

On November 13, 1997, the District Court entered a written Order denying Petitioner's motion to recuse. (Doc. 32). On or about December 4, 1997, Petitioner filed a petition for writ of mandamus with the Fifth Circuit. Petitioner did not, however, attend the previously set December 4 hearing, even though it had been set at her request. (App. at 47 (Doc. 47)). The Court contacted her at home, and she contended that she did not have to appear because her petition for writ of mandamus was pending. (App. at 46 (Doc. 47, p. 2)). The Fifth Circuit had, however, in *Woodson*, already rejected this argument, holding that the filing of a mandamus petition does not stay proceedings in the district court. *Woodson*, 57 F.3d at 1418.

Thus, there is no support for Petitioner's contention that she was unable to comply with the District Court's Orders, despite a good faith effort to do so, or that the District Court denied her the opportunity to conduct discovery. Indeed, the record demonstrates that Petitioner's claims were dismissed not because she failed to

comply with every minute detail of the District Court's Orders, but because she failed to comply in any respect with any of its Orders, or to even attempt to comply. Instead, she affirmatively refused to comply, and even took steps to frustrate the carrying out of the District Court's Orders.

2. No lesser sanction would have been effective.

The District Court tried both the carrot – multiple extensions and lengthy explanations of its Orders and their basis – and the stick – threats of dismissal – to obtain compliance with its Orders. Neither worked. In the end, the District Court correctly concluded that, despite its efforts, "there is obviously nothing I can do to persuade Ms. Davis to follow the rules or my orders, or otherwise responsibly to pursue this claim." (App. at 46 (Doc. 42, p. 2)).

> Well, you know, before you impose the death penalty, as people say, you should work hard to assure yourself that no lesser penalty would suffice.
>
> In this case on a couple of occasions, the complications of this kind of claim had been discussed with Ms. Davis, and what was required to connect Syntex's substance to her condition was discussed.
>
> At those occasions, the entries in her medical records which appeared to disclaim the very connection that she was asserting were discussed, all in an effort to focus both counsel on

what truly needs to be done in the case rather than traditional standard discovery.

She has repeatedly refused to produce the information peculiarly within her knowledge, has categorically refused to obey orders to furnish records and identify people, and has not, of course, produced an expert's report or identified any expert who makes the connection [sic] of her identification of her medical service providers, as we discussed with her once before, is wholly inadequate.

She is sometimes sick but she's not too sick to produce notices of nonappearance, repetitive motions to recuse, all based on my inability to read the rules of civil procedure, including this inch and a quarter stack of stuff and her refusal to attend hearings.

Frequently, in these kinds of cases, the Court is put in the dilemma of ascertaining whether we're dealing with client recalcitrants [sic] or counsel's recalcitrants [sic]. Here that dilemma is solved because patient and doctor are the same, and it is clear to me that Ms. Davis has a peculiar view of her responsibilities as a client, and independently, as counsel. She has failed in both of those duties after, what I believed to have been, polite, patient reexplanations of her responsibilities.

The only response that Syntex or the Court has received from the attempt to manage this litigation so we could dispute and resolve the problems that actually occurred has been unilateral assertions that she's not going to comply, not going to attend, not going to pay for, not going to produce, and perhaps the most egregious, is to threaten suit against what

> amounts to a clerical service retained by your firm.
>
> Noncooperation comes naturally to some folks with not much effort. In those instances she actively asserted, as a lawyer and client, a cause of action against people who didn't, people who are not responsible for the actions that they were about to take, and who in any event had not done anything wrong if they had done everything they had been asked to do.
>
> That's one step, one small step about [sic] willful destruction of evidence. It increases the costs, of course, and reduces the likelihood that Syntex will see the evidence that will make it clear one way or the other that it might be responsible for her illness.

(App. at 47-49 (Doc. 42, pp. 4-6)). Thus, in this case, the District Court considered (and tried) other alternatives, but concluded they would not work, and there is thus no basis for Petitioner's argument that the District Court should have granted her additional time in the face of Petitioner's affirmative refusals to comply with the District Court's Orders.

This Court has affirmed dismissals under similar circumstances. *E.g., National Hockey League*, 427 U.S. at 643 (dismissal for repeated failure to answer interrogatories despite multiple opportunities and admonitions); *Link v. Wabash R.R.*, 370 U.S. 626 (1972) (affirming dismissal for failure to attend pre-trial conference given prior history of delay). As this Court noted in *National Hockey League*, "[t]he question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District

Court abused its discretion in so doing." 427 U.S. at 642. In this case, the record demonstrates, as the Fifth Circuit found, that Petitioner "willfully abused the judicial process" and that the District Court "acted well within its discretion and showed considerable restraint in handling this matter." Pet.'s App. 2 at 4.

B. The District Court Did Not Err in Requiring Petitioner to Designate One or More Experts on Causation and Provide Reports.

Petitioner's various arguments concerning the timing of the production of her expert report are all without merit. Fed. R. Civ. P. 26(a)(2)(C) provides that the identification of experts and the provision of their reports, "shall be made at the times and in the sequence directed by the Court," and Fed. R. Civ. P. 16(b) authorizes the district courts to issue scheduling orders, including deadlines for the designation of experts and the provision of reports. Petitioner's reliance on the default provisions of Rule 26 and the parties' joint case management plan are thus misplaced.

Petitioner's argument that she could have established causation without expert testimony is equally flawed. (Pet. at 12). All Petitioner's claims are based on her allegation that she was injured as a result of receiving Synarel. (Doc. 3). To prevail on any of these claims under Texas law, she must establish causation. *E.g., Doe v. Boys Club of Greater Dallas, Inc.*, 907 S.W.2d 472, 481 (Tex. 1995); *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 775 (Tex. 1995). Whether Petitioner's alleged injuries were caused by Synarel is outside the common experience of lay jurors

and must be established through competent expert testimony.[17] *E.g., Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995); *Orkin Exterminating Co. v. Davis*, 620 S.W.2d 734, 736-37 (Tex. Civ. App. – Dallas 1981, writ ref'd n.r.e.); *Tyler Mirror & Glass Co. v. Simpkins*, 407 S.W.2d 807, 813-14 (Tex. Civ. App. – Tyler 1966, writ ref'd n.r.e.). Thus, if Petitioner failed to timely designate experts or offer expert testimony at trial, Respondent would be entitled to judgment, because there would be a complete failure of proof as to causation.[18]

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[17] Petitioner cites the wholly inapposite case of *Indentiseal Corp. v. Positive Identification Sys., Inc.*, 560 F.2d 298 (7th Cir. 1977) for the proposition that Federal Rules of Civil Procedure "do not give district judges the authority to compel a litigant to engage in discovery . . . " *Id.* at 301. In *Indentiseal*, the plaintiffs' counsel made a strategic decision not to engage in discovery prior to trial. The trial court dismissed the case for want of prosecution on the grounds "that the pretrial work necessary to efficiently try [the] action had not been done." *Id.* The Seventh Circuit reversed, essentially on the grounds that litigation strategy decisions are left to counsel, not the district courts. *Id.* at 302.

Indentiseal, a commercial case, has nothing to do with this case. Petitioner cannot establish causation without expert testimony. She certainly cannot, as she apparently believes, simply introduce Respondent's documents (which she failed to examine) without expert testimony to explain how these supposed documents establish causation. If Petitioner made a strategic decision to proceed without experts, then Respondent was entitled to judgment.

[18] There is no support for Petitioner's argument that she "had sufficient information to substantiate her claims that . . . Synarel . . . caused or contributed to the medical problems of which she complained." Pet. at 3. Nothing in the documents submitted below by Petitioner or anything else in the record states that there is a causal relationship between Synarel and

1. The District Court did not err in refusing to defer the production of Petitioner's expert report until Respondent had complied with her onerous discovery demands.

Petitioner argues at great length, as she did below, that the District Court erred in not requiring Respondent to comply with her voluminous discovery requests and in not excusing her from providing an expert report until the documents were produced. Petitioner's contentions, however, are belied by her failure to examine the thousands of pages of documents Respondent offered to produce and her failure to heed the District Court's instruction to submit a statement from her expert concerning the specific additional documents the expert needed to formulate his or her opinions. (App. at 20 (Doc. 34, p. 15)). Moreover, it was only after Petitioner failed to honor her pledge to produce an expert report by September 8 that she began demanding to be excused from compliance until Respondent met her discovery demands. Indeed, in her June 25 motion for extension, Petitioner stated that she needed additional time to obtain several items, including her own medical records and documents from the FDA, to provide to her expert. (App. at 2-3 (Doc. 9)). Not only did she fail to produce any medical records obtained by September 8, but she indicated in her September 5 filing that she did not, in fact, have an expert. (App. at 5-7 (Doc. 11)).

Petitioner's arguments have nothing to do with due process, equal protection, access to the courts, or any

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any of the injuries alleged by Petitioner or even that such a relationship is likely or possible.

other aspect of the Fourteenth Amendment or with the First or Seventh Amendments. They have everything to do, however, with the district courts' right to control the timing and sequence of discovery and to manage their dockets. Accepting Petitioner's arguments in this case would not only impose a dramatic double standard of discovery – Petitioner is entitled to all documents having anything at all to do with Synarel, without limitation, while Petitioner only has to produce those medical records that she herself deems relevant – it would amount to the acceptance of the proposition that litigants, and not district courts, have the ultimate authority to dictate the timing, sequence, and manner of discovery.

III. The District Court Did Not Err in Awarding Costs to Respondent.

Petitioner's only challenge to the District Court's award of costs is that it includes costs for obtaining her medical records. These costs are allowable costs under 28 U.S.C. § 1920. *E.g., Finchum v. Ford Motor Co.*, 57 F.3d 526, 534 (7th Cir. 1995); *Garmong v. Montgomery County*, 668 F. Supp. 1000, 1011 (S.D. Tex. 1987). Moreover, the District Court properly ordered payment of these costs at the October 17 hearing based on Petitioner's repeated failure to produce medical records as ordered. (App. at 29 (Doc. 34)).

IV. The Fifth Circuit Did Not Erroneously Fail to Require Recusal.

Petitioner also seeks an order requiring the District Court's recusal for alleged bias. (Pet. at 15-17). As grounds for recusal, Petitioner cites the District Court's rulings complained of in her petition and a reference to "extortion" taken completely out of context. *See supra* n. 12 and accompanying text. She also complains that she was "prohibited often from responding, explaining or addressing issues of concern to the court." Pet. at 16. Nothing could be further from the truth. Petitioner was allowed to file multiple, repetitive motions, repeatedly arguing the same points that had already been rejected by the District Court. Likewise, she was allowed great lee-way at the October 17, 1997 hearing to attempt to argue her position and explain her points. Petitioner then failed to attend the November 4, 1997 status conference and subsequently failed to attend a hearing that had been set at her request on motions seeking relief from prior Orders of the District Court.

Recusal for bias or prejudice is only constitutionally required "in the most extreme of cases . . . ." *Aetna Life Ins. Co. v. LaVoie*, 475 U.S. 813, 821 (1986). Moreover, the alleged bias or prejudice must be based on an extra-judicial source and cannot be based merely on court rulings that Petitioner disagrees with or opinions expressed by the District Court formed on the basis of the evidence before it, i.e., Petitioner's conduct. *E.g. Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1301 (D.C.

Cir. 1988). In this case, as in *Woodson*, the record demonstrates exceptional patience and forbearance by the District Court and is devoid of anything that would warrant recusal.

V. The Petitioner Has Not Demonstrated any Compelling Reason to Review this Case.

There is no support for Petitioner's constitutional claims or for her contention that the Fifth Circuit's decision was inconsistent with applicable decisions of this Court or that there is a conflict in the circuits as to "what constitutes discovery abuse which would warrant sanctions." Pet. at 5.[19] This case represents an absolutely

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[19] Petitioner argues that there is a conflict between the Fifth Circuit's decision in this case and its previous decision in *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983). In *Ryland*, the plaintiffs brought a civil rights action alleging that their daughter was murdered by one defendant and that all defendants, acting under color of state law, concealed the murder and prevented a full investigation. The District Court dismissed on standing grounds, and the Fifth Circuit reversed. This case has absolutely nothing in common with *Ryland*. Among other things, Petitioner's claims were not dismissed for failure to state a claim, nor was it held that she lacked standing. Instead, unlike the plaintiffs in *Ryland*, Petitioner's claims were dismissed because of her own conduct. The other case cited by Petitioner in an attempt to demonstrate a conflict is *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir. 1997). If anything, *Swekel* supports Respondent's position. In *Swekel*, the survivor of a pedestrian who died in a traffic accident brought a civil rights claim against the city and its officials, alleging that their cover-up of the identity of the second driver allowed the statute of limitations on her wrongful death action to run, thereby violating her right of access to the courts. The Sixth Circuit, however, held that the

straightforward application of the rule that district courts, and not litigants, have the right to control their dockets and discovery. None of Petitioner's exaggerations or distortions can transform this unremarkable case into one worthy of this Court's review.

CONCLUSION

The decision of the Fifth Circuit comports with the Federal Rules of Civil Procedure and with the decisions of the federal courts. There is nothing "special" or "important" under Rule 10 for this Court to consider. The petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent
Syntex (U.S.A.), Inc., Sued as
Syntex Laboratories, Inc. and
Roche BioSciences, Inc.

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survivor's failure to make some attempt to gain access to the courts precluded her recovery on the claim that her right of access was denied. Similarly, in this case, Petitioner's repeated refusals to follow the District Court's Orders, and indeed, her overt attempts to frustrate the District Court's Orders, preclude a claim that she was somehow denied a right of access to the courts.

APPENDIX

LIST NAMING ALL PARENT COMPANIES AND NON-WHOLLY-OWNED SUBSIDIARIES (GREATER THAN 5 PERCENT) OF RESPONDENT SYNTEX (U.S.A.), INC., SUED AS SYNTEX LABORATORIES, INC. AND ROCHE BIOMEDICAL LABORATORIES, INC., AS REQUIRED BY RULE 29.6 OF THIS COURT.

Roche Holdings, Inc.

Roche Finance, Ltd.

Roche Holding, Ltd.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VERONICA L. DAVIS,	§	
Plaintiff	§	
	§	
VS.	§	**H-97-177**
SYNTEX LABORATORIES, INC. & ROCHE BIOSCIENCES,	§	**(Filed Jun 25, 1997)**
Defendants	§	

PLAINTIFF'S MOTION TO EXTEND TIME TO FILE EXPERT REPORT TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Veronica L. Davis, Plaintiff, in the above entitled and numbered cause and makes this Motion to Extend Time to File its Expert Report and in support thereof would show the following:

1. That on June 09, 1997, a Status Conference was held with opposing counsel and the Honorable Lynn Hughes;

2. That the Court set June 30, 1997 as the date by which Plaintiff should file an expert report showing the causal connection between her injuries and the medication which is the object of this suit;

3. Plaintiff's expert is unable to comply with the date set by the Court, as additional data, information, and previous medical records are being obtained and retrieved which is not in [sic] currently in the hands of the expert;

4. Because the Court apparently seeks a more in depth analysis than the one previously provided, additional

data, records, and medical data and studies must be obtained.

5. Plaintiff believes that this information can be obtained and compiled by the next Status Conference set for September 08, 1997.

6. In light of the Court's request, Plaintiff believes that it will be necessary to obtain other experts in the fields of pharmacology and gynecology, thereby, making additional time to obtain these expert opinions necessary.

7. The parties have conferred regarding the submission of the expert reports. Specifically, Plaintiff spoke with Mark Walters, as Richard Josephson was on vacation on the date of Plaintiff's call, June 24, 1997.

WHEREFORE PREMISES CONSIDERED, Plaintiff seeks an extension of time to file its Expert Report(s).

Respectfully submitted,

/s/ V.L. Davis
Veronica L. Davis
S.B.T. # 05557300
222 N. Mattson
West Columbia, Texas 77486
(409) 345-2953
(409) 345-5461

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiff's Motion for Extension has been sent by U.S. Mail to Baker & Botts, 3000 One Shell Plaza, 910 Louisiana, Houston, Texas 77002 on this the 24th day of June, 1997.

/s/ V.L. Davis
VERONICA L. DAVIS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
HOUSTON DIVISION

VERONICA L. DAVIS, PLAINTIFF	§	
vs.	§	CIVIL ACTION NO. H97-177
SYNTEX LABORATORIES, INC. & ROCHE BIOSCIENCES, DEFENDANTS	§	(Filed Sep. 05, 1997)

PLAINTIFF'S RESPONSE TO THE COURT'S ORDER TO PRODUCE REPORTS FROM DOCTORS

TO THE HONORABLE UNITED STATES DISTRICT COURT:

NOW COMES Veronica L. Davis, hereinafter called Plaintiff, and in response to the Court's directive to provide "reports from the doctors that can explain the causal link between the drug and her condition", Plaintiff produces the following information in lieu thereof:

1.

a. The medical narrative from Tahgi Shafie

b. The notes/consultation report from the medical file of Dr. Edward Murphy

c. Findings submitted to the Food & Drug Administration showing the causal connection between the aforementioned drug and rats.

d. Findings submitted to the Food & Drug Administration regarding seeing if same occurs in children with precocious puberty;

e. Case study information showing the occurrence of pituitary adenoma (not included)

f. The Physicians's Desk Reference (not included)

g. The package insert from Synarel

h. Proposed labeling on package insert for year 1991?; paragraphs 19, 20, 13, 26 and figure below paragraph below 27, 31-36

2. Plaintiff would show that she has exercised due diligence in seeking to obtain an expert, other than her treating physicians, as it relates to the effects of the aforementioned medication. However, each individual contacted thus far, intimately familiar with the medication made the basis of this lawsuit has either worked for Syntex U.S.A. or done research for Syntex U.S.A.

3. Plaintiff needs additional time to secure an expert as it relates to the causal connection between the drug and the symptoms experienced by Plaintiff.

4. Plaintiff would show that by the information provided by Syntex laboratories regarding the causal connection between the drug and the symptoms complained of by Plaintiff, same is not necessary, as Syntex has acknowledged, admitted, or shown evidence that same or adverse effects of the medication.

5. Plaintiff would further show that if Defendants would engage in free discovery and provide the Initial Disclosures as required by law, the causal connection would be evidence to the Court, without necessity for an expert report.

WHEREFORE PREMISES CONSIDERED, Plaintiff submits the foregoing information in lieu of an expert's report and seeks additional time to secure same.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VERONICA L. DAVIS,	§	
Plaintiff	§	
	§	
VS.	§	**H-97-177**
SYNTEX LABORATORIES, INC. & ROCHE BIOSCIENCES,	§	
	§	
Defendants	§	

MOTION TO QUASH DEPOSITION BY WRITTEN QUESTIONS

(Filed Oct. 17, 1997)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, VERONICA L. DAVIS, Plaintiff, in the above entitled and numbered cause and makes this its Motion to Quash the Deposition on Written Questions and in support thereof would show the following:

Plaintiff received notice of Intention to Take Deposition by Written Question of the following entities on September 29, 1997:

1.

a. Columbia Bellaire Medical Center

b. Hnrey [sic] D. Wilde, Jr.

c. Raymond Martin, M.D.

d. Memorial Hospital Southwest

e. Brazosport Memorial Hospital

f. Angleton-Danbury General Hospital

g. Texas A & M University – A.P. Beutel Health Center

h. Harris County Child Protective Services

i. Liberty Mutual Insurance Group

2. On another date (Date Unknown), Defendant's sought Deposition on Written Questions from the following medical providers:

a. John Burr Miller III

b. Richard Berger

c. Samuel Marynick

d. Maurice L'Ecuye

e. David B. Rosenfeld

3. Plaintiff would show that a motion to quash is necessary in that even though Plaintiff has sought a Protective Order on September 13, 1997, to stop the production of all irrelevant records, relevant to the proceeding at hand, and all records which constitute an unwarranted invasion of privacy, Defendants have continued to seek the production of Plaintiff's medical records.

4. Plaintiff would further show that a hearing on its Motion for Protective [sic] was set for October 17, 1997 with all parties having been noticed of an earlier hearing on or about September 29, 1997, however, in spite of same, Defendants sought the production of the medical records of Plaintiff, without a valid medical authorization to do so.

5. Plaintiff would further show that the seeking of a Protective order should have caused a cessation in the request for such records by the Defendant, however, Defendant has continued in its campaign of harassment, though a hearing has been set on the matter.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VERONICA L. DAVIS
plaintiff

v.

SYNTEX LABORATORIES, INC. and ROCHE BIOMEDICAL LABORATORIES, INC.
defendants

97-CV-177
October 17, 1997
Houston, Texas
11 a.m.

BEFORE THE HONORABLE LYNN N. HUGHES
UNITED STATES DISTRICT COURT
PROCEEDINGS

APPEARANCES:

For the Plaintiff:
Veronica L. Davis, Pro Se
222 N. Mattson
W. Columbia, Texas 77002
409/345-2953

For the Defendants:
Mark Walters
Baker & Botts
910 Louisiana, Suite 3000
Houston, Texas 77002
713/229-1234

Proceedings taken and transcript produced by computer-aided transcription.

[p. 2] THE COURT: Thank you. Be seated.

Ms. Davis, do I understand that you have not yet produced your medical records?

MS. DAVIS: No, Your Honor, that is not correct.

Your Honor, may I approach the bench, please?

THE COURT: Yes, ma'am.

MS. DAVIS: I have brought some motions this morning to file with the clerk. I was told to bring them directly to the courtroom, Your Honor. I have furnished opposing counsel with a copy when I arrived this morning.

I amended one of my motions because I found a mistake in it, and in so amending it, I added two other points. The other motion, I added some points that I did not previously discuss, regarding seeking to void the Court's order as it related to the production of the expert report, the Daubert report, that is due on October 31, 1997.

THE COURT: How can you tell me you have produced all your medical records when at the same time you have a motion to prohibit them from getting them?

MS. DAVIS: Your Honor, the medical records that I am seeking to prohibit deal with medical records that are not relevant to this case.

THE COURT: I get to decide that, Counsel.

MS. DAVIS: Your Honor, may I make my motion and my argument?

[p. 3] THE COURT: No. You're going to do what I want to do. I'm in charge here.

Now, we've been together at least twice, and I told you that it is your responsibility to produce your medical records. Now, the first thing I asked you this morning was, have you produced your medical records, and you said yes. And the answer is that you have not produced your medical records.

MS. DAVIS: No, sir, that is not the answer. I am seeking a motion to –

THE COURT: You have either produced them or you haven't. That's a physical fact, ma'am. That you've filed a motion for protective order, that you have moved to quash them, that you have asserted a privilege does not affect the fact that I told you to do it some time ago.

MS. DAVIS: Your Honor, they have been produced. That doesn't mean that I don't object to the production of the documents.

THE COURT: Does Syntex have your medical records?

MS. DAVIS: Yes, Your Honor, they do.

MR. WALTERS: No, we don't, Your Honor. We have some medical records. After we had the last hearing, Ms. Davis asked me to send her a list of what we did and did not have. I did that. Then we got the motion to compel. I know that we still have many records ordered that are – records orders that [p. 4] are outstanding because of her – I mean, her pending motion to quash. So, I mean, there are things that we have asked for that we don't have.

THE COURT: Before you asked for them, Mr. Walters, I told her to produce them.

MR. WALTERS: Absolutely. No question about it. And we got – all I'm saying is, we don't have some of those things.

THE COURT: When I tell you to do something, Ms. Davis, you must do it.

MS. DAVIS: Your Honor, may I speak, please?

THE COURT: No, You must listen.

Now, I ordered you to produce your medical records; I did not order Mr. Walters to go get them. He has, in the face of your refusal to do as you were ordered, set about fetching them on his own. And that is all right with me, too, because there is a secondary reason he is doing that, and that is, he has no confidence that you will produce them all, no matter what I say.

I'm going to ask you one more time: Have you produced all of your medical records? And I think I said back for ten years, didn't I?

MS. DAVIS: That's the problem, Your Honor. They have gone back to the –

THE COURT: Wait. Wait. I didn't ask you that, I asked Mr. Walters that.

[p. 5] MR. WALTERS: I don't recall that, Judge. You might have –

THE COURT: Well, it doesn't matter.

If I didn't say – they can go back as far as they want. It's a medical question. You are to do what you are told.

Now, it should have occurred to you at the pretrial conference that I knew about the patient-physician privilege and that I understood that, frequently, medical records are exempt from discovery.

But when you bring a case making claims based on your medical condition, your records are not privileged and you either produce them or I dismiss the case. That was all covered when I said for you to produce the records. The discussion was over.

When I say "produce your records," that is not an invitation to wait two months and file a bunch of motions about those records. The time for you to have asserted a privilege that you may have had was when I told you to produce them.

MS. DAVIS: Your Honor, I did that.

THE COURT: And I overruled it, apparently, didn't I?

MS. DAVIS: Your Honor, you didn't speak to that. My motion was not written. And at the particular –

THE COURT: Well, it doesn't need to be written, [p. 6] Counsel. You speak up or it is over.

MS. DAVIS: Your Honor, you prohibited me from speaking any further during the hearing. Furthermore, I did not –

THE COURT: Well, it's because you refused to talk about what I want to talk about. We have to focus.

Now, you don't have a privilege. You are making claims based on what this drug did to you. You must give them the evidence about your medical condition.

MS. DAVIS: Your Honor, if I may be allowed to respond? When I made the initial disclosures at – before pretrial, all of those documents have been furnished. On the date –

THE COURT: All of what documents?

MS. DAVIS: All of the medical records that I had submitted to them as related to this particular claim have been submitted, and they have all of those records.

On the day after our pretrial conference, I asked them what records do you not have so that I can get those for you by the 17th.

THE COURT: You knew what they had. You gave them to them. You knew what they had because you gave them the records they had.

MS. DAVIS: Your Honor, I didn't have –

THE COURT: So, all you do is give them the rest.

[p. 7] MS. DAVIS: I did not give them the records all the way dating back from my birth because they weren't relevant.

THE COURT: No, no. Wait, wait.

MS. DAVIS: They asked for all of that after our hearing.

THE COURT: Ms. Davis, no. At the hearing.

MS. DAVIS: After the hearing.

MR. WALTERS: That's not correct, Judge.

THE COURT: Wait.

Ms. Davis, any records Syntex had about your medical history, you gave them in your initial disclosures.

MS. DAVIS: Yes, Your Honor.

THE COURT: That's the only records they had.

MS. DAVIS: Uh-huh.

THE COURT: So when I say, "Give all your medical records," you knew what they had because you had furnished them, so you knew what was left to be furnished, without ever talking to Mr. Walters.

MS. DAVIS: That's not true, Your Honor.

THE COURT: Why is it not true?

MS. DAVIS: Because, at that particular time of our pretrial conference, I had not provided them with everything. I was ordered to do so by 9-17.

THE COURT: I understand. That's what I just said.

MS. DAVIS: Uh-huh. I had no –

[p. 8] THE COURT: Look, Listen. Listen real carefully. You have ten medical records in your entire life. In the initial disclosures, you have given them three. When I say "give them everything," that means you give them the other seven. You don't need to ask him what he has. You gave him 1, 2 and 3 and decided 4 through 10 were not relevant. I said, give them to him.

There's no way that you could have not known what they had or what they wanted, because I told you when

we discussed it, he told me he wanted them all, I said give them all to him.

MS. DAVIS: Your Honor, in terms of the initial disclosures, that's not the problem. We're not talking about those medical records. We're talking about –

THE COURT: The problem is that you cannot follow orders. That is the problem.

MS. DAVIS: Your Honor, I did not understand the order of the Court to be to provide all my medical records since the time I was born, nor did I have any idea that they were going to ask for medical records from the time I was born, from the hospital of my birth on through my entire life, for incidents wholly unrelated to the cause of action pled.

So, on the day after our hearing, when I was told to produce these documents by the 17th, they had tons of documents whom I didn't even remember, didn't even know I had [p. 9] gone to. They were so far removed from this point in time that I never would have been able to respond to the order by the 17th, or I would have spoken up. And I thought we were simply talking about the medical records that was listed on my initial disclosures as being relevant and related to this cause of action.

THE COURT: Ms. Davis, that is insane. If you have made disclosures, and I say "make the rest of them," I cannot be talking about what you've already done.

June the 9th, 1997, I ordered you to produce your medical records. That is what I said, and that is what I wrote down, and that is what I signed, and that is what is on the docket sheet. It is not the least bit confusing:

"Produce medical records." I didn't say, "Give them what you've already given them"; I said "Produce your medical records."

And then, three months later, three months later, on September 8th, 1997, I then ordered you again to do it by September 17th. And as we sit here today on October 17th, you have not done it. That sounds like a deliberate, intentional violation of court order.

MS. DAVIS: Your Honor, it was not, because that was not my understanding of the Court's order.

THE COURT: Well, I am not obliged to give you understanding; I am only obliged to give you the orders. You are supposed to understand them. Apparently Mr. Walters [p. 10] didn't have any trouble understanding them.

This morning you have filed a motion to quash the depositions by written questions.

Mr. Walters, do you have one of those?

MR. WALTERS: Yes. I just got it this morning, Your Honor.

THE COURT: Then there is an amended motion for protective order and an amended motion to vacate an order that, of course, long ago expired.

Now, is it your understanding, Ms. Davis, that if I order you to do something by September 17th, and on September 12th you move to vacate that order, that the motion in any way vitiates the force of the existing order?

MS. DAVIS: I am not familiar with the term "vitiate."

THE COURT: Do you understand that moving to vacate an order stays the order or vacates the order until the hearing?

MS. DAVIS: No, Your Honor, I'm not aware of that.

THE COURT: So even though you moved before the 17th, the order has never been vacated or modified, has it?

MS. DAVIS: No, Your Honor.

THE COURT: And it has not been obeyed?

MS. DAVIS: In the Court's opinion.

THE COURT: Well, have you produced all of your

* * *

[p. 14] THE COURT: That's what it says.

MS. DAVIS: The nature of my motion is that it is usual and customary to produce an expert report 90 days before trial.

THE COURT: Ms. Davis?

MS. DAVIS: Yes, sir?

THE COURT: I'm a patient person within very restricted limits, I suppose. But don't you tell me when I tell you to do something, that it is customary to do something else.

You may do it however you want. You may choose wholly to disregard my orders. You may decide that the presumptive standards and rules of civil procedure take precedence over a case-specific direct order of the Court. That is something that you are free to do. But your case will be dismissed with prejudice.

MS. DAVIS: Your Honor, may I –

THE COURT: Is that clear?

MS. DAVIS: Yes. I hear you, Your Honor.

THE COURT: So do not tell me that you prefer to do something that is customary, rather than as I order it. We will discuss each subject, and then I will decide how it will be handled, and then you will either do it or the case will be dismissed. It's very simple.

Now, we have discussed this. Actually, I think [p. 15] the initial conference was June 9. We have discussed on a couple of occasions that Syntex has a responsibility to respond to a very specific, scientifically based complaint; they do not have the responsibility to disgorge all of their files just because you have made an unsubstantiated complaint against them.

If you can articulate some specific need for some documents that they may have, then I will make them produce them, if I believe the need is genuine. Certainly if one of your science consultants articulates the need for some additional data besides your condition and the history of what you took when, then I will consider making them respond to it promptly.

But for you to demand wholesale, so far, apparently wholly irrelevant documents from them, while cloaking

your medical history, suggests a malicious attempt to have Syntex pay you the value of the transaction cost you're imposing by making the claims in the first place. And that is not why we have lawsuits, so that you can extort a settlement value from them by attrition.

If Syntex had done something wrong, it should compensate you. It is your responsibility as the plaintiff to prove that they did something wrong.

At the moment, we have no evidence that the injury you claim to have suffered is connected with Syntex's [p. 16] product, and that is an essential element of your claim and we are not doing anything else until we know that Syntex has a factual connection to this case.

MS. DAVIS: Your Honor, if I might respond, this is not an attempt to extort money from the defendant. There has been material submitted to this Court along with my pleading that shows the causal connection between this drug, without the benefit of an expert.

It shows that this condition does occur; that it has occurred with children that are taking this medication, it has occurred in the studies. That information has been submitted to the Court, with or without my expert report.

Now, if I am prohibited totally from examining the records, there is certainly enough information that I have obtained from the FDA that indicates that this is a causal effect of this drug.

If I am prohibited from doing any discovery whatsoever, you limit my ability to prepare for my case. The Court is – the jury is supposed to be the trier of fact, not the Court, and I am being prohibited from ever getting

my case to the jury or doing anything because I can't look at any documents related to this.

The defendants had to submit information to the FDA. They've done studies. They've done all kind of lab reports. Almost everyone that I have contacted in connection

* * *

[p. 18] is setting a different standard than it is setting for any other plaintiff in the United States, and it is inappropriate, Your Honor.

THE COURT: Anything else?

MS. DAVIS: I am asking the Court to reconsider its position and allow me the time to produce the expert report after having engaged in substantial discovery and having the defendants disclose the relevant information that I have asked for.

I have not asked for any documents that are irrelevant. I have case law that will support that everything I have asked for is relevant, reasonable, necessary and material to this cause of action.

And aside from all of that, the defendants have obtained almost all of my medical records, and an execution for authorization has been tendered to them for everything they haven't obtained, even though I don't believe that they're entitled to everything.

THE COURT: I didn't tell you to give them permission; I told you to give them the medical records.

MS. DAVIS: Your Honor, I could not, in the scope – in the course of nine days, go to every medical

provider that I've ever been to in my life. I don't even know who they are.

That is an impossible burden to meet, and I cannot do it. If I hired a team of people, they couldn't do

* * *

[p. 20] "Give us medical records going back to the time of your birth." That's just not accurate.

MS. DAVIS: Community Hospital is where I was born. It's doesn't even exist anymore.

THE COURT: I don't care where you were born, Counsel. And do not talk to the other lawyer. You want to have a conversation with Mr. Walters, call him up, take him to lunch or something.

Did they send you a release?

MS. DAVIS: Yes, Your Honor, they did.

THE COURT: Did you sign it and send it back within a week?

MS. DAVIS: No, Your Honor, I did not.

THE COURT: Have you ever sent it back?

MS. DAVIS: Yes, Your Honor, I have.

THE COURT: When did you send it back?

MS. DAVIS: I sent it back after our status conference.

THE COURT: When?

MS. DAVIS: I don't know the date.

THE COURT: Well, we've had several. So you sent it in September?

MS. DAVIS: Yes, Your Honor, I did.

THE COURT: And they sent it to you when? In June?

MS. DAVIS: Your Honor, as I explained –

[p. 21] THE COURT: In June? Is that when they sent it?

MS. DAVIS: I believe so.

THE COURT: And you returned it in September, after you had been twice ordered to produce the records yourself?

MS. DAVIS: No, Your Honor. When I came here on September the 17th, I sent a stack of items to Baker & Botts about this thick (indicating). I did not realize that it was not in there until I got a subsequent letter from them, saying "We don't have it." I sent them –

THE COURT: You didn't send it to them. Whether it was a mistake or just being obnoxious, you either sent it or you didn't. You see, there are real-world things out there. Either they have it or they don't. And if there is some explanation, that's fine.

But the answer to the question is, you got it from them in June and you did not return it until after two court orders to do it yourself. And then, two months or so, three months and two court orders later, you sent it to them. Those are the facts.

Have you not been admitted to the Angleton Danbury General Hospital in the last ten years?

MS. DAVIS: I don't know when was the last time I was there.

THE COURT: So, it is –

MS. DAVIS: I would think that it was – it has been

* * *

[p. 25] specificity in the pleadings. And the only things made with specificity are these allegations of the medical condition. The only people I know that have any knowledge of those things are plaintiff and her doctors.

I don't know what else I'm supposed to do in response to a complaint that says, "I took your product, I have a bunch of problems, and you're at fault."

What I have received since then, I have requests for productions that literally ask for every single piece of paper that we have that has the word "Synarel" written somewhere on it.

I don't know what else to do until we get to the point where we have done what the Court has ordered and we have the medical records and we have the expert reports and we have somebody who is going to come forward and say, "Look, this is what the problem is. It's this, this and this," and we can say, "Okay, here is somebody who is knowledgeable about that and you can take their deposition."

THE COURT: The reason for case-specific discovery orders is that cases vary a great deal in the factual

context, and there is, as this case illustrates, considerable asymmetry in sources of information.

In a case like this, the plaintiff has unique knowledge that connects her injury to the defendant. This is not a case where the defendant knows how it was driving or how [p. 26] it maintained its truck right before the collision.

The defendant in this case is obliged to make considerable regulatory disclosures, does in fact commercially disclose medical data about the drug, and most of all, has the requirement in this state that there be a licensed medical expert between the sale of the drug and the consumption by the patient.

Under the circumstances of this type case, the discovery is – the information that needs to be discovered is the plaintiff's information.

I have had these kinds of cases where it turned out, when you looked at the medical records, the plaintiff actually didn't take the drug as alleged.

The only way to find out whether there is a connection between the plaintiff's claim of this drug's ill effects is to know the nature of the plaintiff's physical condition, the diagnosis, what was prescribed and when; including the defendant's drug, plus other drugs, because there are positive and negative synergies, although I don't think "synergy" technically should be used in a negative sense.

There are good and bad combinations for drugs, and there are good and bad combinations of symptoms. And

most important, every biochemical adjustment of a person has secondary consequences that are less than favorable. No [p. 27] medical or chemical intervention does not have side effects. Therefore it is essential in this kind of case, that the defendants know the benefit sought, the benefit achieved, as well as the alleged secondary unfavorable consequences.

The Court has not totally prohibited discovery from the defendant. The Court has made the discovery from the defendant depend upon a proper production by the plaintiff of a connection between her complaint and the defendant's product.

Ms. Davis, when do you think the Daubert report is now due under the several extensions that Syntex and the Court have allowed you?

MS. DAVIS: October 31, 1997.

Your Honor, may I sit, please? If I stand for a long period of time, I experience dizziness.

THE COURT: You may sit.

MS. DAVIS: Thank you.

THE COURT: Ms. Davis, I am not sure that you are in exactly a position to answer this, but I want to ask it: Your physical condition does not have the effect of interfering with your ability, that is, your competence, to perform these tasks that are required in litigation, does it?

MS. DAVIS: To a certain extent, yes. There are episodes when I cannot visualize things properly. I can't – there are times when I'm prohibited from driving, or I

[p. 28] can't drive because I am having blurriness of vision and severe headaches, so I'm not –

THE COURT: But you wouldn't have had severe headaches and blurry vision for four months.

MS. DAVIS: No. I am not saying it is an every-day occurrence. It comes and goes.

THE COURT: And we have no motion for a continuance based on your condition?

MS. DAVIS: No, Your Honor. I was hoping to have counsel retained by this point in time.

THE COURT: Unfortunately, if you conclude that your competence to respond to the requirements of litigation has been diminished, the only solution is that you find other counsel.

MS. DAVIS: Yes, Your Honor. I am intending to do that.

THE COURT: There is nothing I can do, other than make sure that that question is addressed.

The request for motion to – the request for production from Syntex is quashed. The deposition on written questions are not quashed. No protective orders will be granted, and the December – or the October 31st deadline for the expert reports subsists.

MR. WALTERS: Your Honor, may I sit, as well?

THE COURT: You look young and healthy.

MR. WALTERS: All right.

THE COURT: You can sit until I talk to you.

MR. WALTERS: Certainly. I understand that.

THE COURT: Yeah.

After the – and at this point, I want a copy of the medical reports filed with the Court, as well as Mr. Walters.

MS. DAVIS: Your Honor, may I ask a question?

THE COURT: Yes, ma'am.

MS. DAVIS: Since they have a medical organization and have already requested these documents through Marcus Business Records, are you still requiring that I actually physically go get the remaining records?

THE COURT: Well, that's what I was thinking about during that long pause. You will get to Mr. Walters by noon Tuesday a complete list, as I described, of your best recollection of every medical service provider whom you have ever seen, and you will sign it.

Syntex's request for the deposition upon written questions will go ahead to those people to whom they have already been issued, and when Mr. Walters gets his bill for them, he is going to send it to you and you will pay it.

You have the list of people that – whom they have notified of their depositions, and you need to make sure that all the rest of your medical care providers is disclosed. It [p. 30] would be helpful if you could remember roughly when and roughly for what you may have seen those people, but that's not a limitation.

Now, do we still have an early November conference set?

MR. WALTERS: Your Honor, I walked out without my calendar. I apologize.

MS. DAVIS: It's set for November 10th, Your Honor.

THE COURT: November 10th, 3:30.

Ms. Davis, if you have not done as you have been ordered, including any subsidiary orders that may have been made and not discussed today, or if you otherwise have been intransigent, I am going to dismiss your case with prejudice. Is that clear?

MS. DAVIS: Yes, Your Honor.

THE COURT: Is there anything else you would like to discuss today?

Ms. Davis?

MS. DAVIS: Yes, Your Honor. I am going to request that the Court recuse itself in this case because I don't believe that I would get a fair trial in this particular matter, nor do I believe that I will be treated fairly in this particular case. I believe that there is a great deal of bias in this matter, and I am requesting that the Court recuse itself.

[p. 31] THE COURT: Would you describe, just for the record, as lawyers say, the particular interest the Court may have in this case, or any personal connection to the subject?

MS. DAVIS: No. I don't know of any personal connection that Your Honor has to the subject matter or to the parties in this case.

THE COURT: The Court accepts the oral motion to recuse, and it is denied. Anything else?

MS. DAVIS: No, Your Honor.

THE COURT: Mr. Walters, anything else?

MR. WALTERS: No, Your Honor.

THE COURT: All right. Counsel may be excused.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VERONICA L. DAVIS,	§	
	§	
Plaintiff	§	
	§	
VS.	§	_ H-97-177
	§	
SYNTEX LABORATORIES, INC.	§	
& ROCHE BIOSCIENCES,	§	
	§	
Defendants	§	

RESPONSE TO THE COURT'S ORDER TO PROVIDE THE NAME OF MEDICAL PROVIDERS

(Filed Oct. 23, 1997)

TO THE HONORABLE COURT:

1. The Defendant has evidenced knowledge of the foregoing medical providers, either through information supplied by Plaintiff or some other source:

   Taghi Shafie – Neurologist –
   D/b/a National Neuro-Psych Thermo
   4150 Westheimer, Suite 105, Houston, Texas 77027
   Diagnosed condition of brain hemorrhage; hospitalization; follow-ups and continuing care since hemorrhage

   a. Edward C. Murphy – Neurosurgeon
   b. David Turner – General Practitioner;
   c. Dr. Gary Tunell – Neurologist
   d. Dr. Wanda Mott – Gynecologist
   e. Dr. Saeid Abedin – Ophthalmologist

f. Dr. Ken Smith
g. Columbia Bellaire Medical Center
h. Henry D. Wilde, Jr.
i. Raymond Martin, M.D.
j. Memorial Hospital Southwest
k. Brazosport Memorial Hospital
l. Angleton-Danbury General Hospital
m. Texas A & M University – A.P. Beutel Health Harris County Child Protective Services
o. Liberty Mutual Insurance Group
p. North Texas Rehabilitation Center
q. John Burr Miller III
r. Richard Berger
s. Samuel Marynick – never seen
t. Maurcie L'Ecuye – never seen
u. David B. Rosenfeld – do not know who he is
v. Community Hospital
w. Dr. S.K. Reddy
x. Dr. Benjamin Weiner

2. In addition to the foregoing, Plaintiff has only seen the following physicians to the best of her recollection:

a. Dr. Kristina Greenwoood [sic] – 4225 Office Parkway, Dallas, Texas 75204 – psychological care from 1994-1995

b. Dr. Robert Kilian 131 Circle Way, Lake Jackson, Texas 77566 – treatment of DeQuervain's disease 1996

c. Dr. Delcambre 7777 Forest Lane, Bldg. A, Dallas, Texas – reasons unknown – 1992

d. Dr. Patrick McNamara 4101 Greenbriar, Suite 200, Houston, Texas 77098 – reasons unknown – 1993

3. Be advised that Plaintiff will not pay for the production of the records from the foregoing, as it is appears patently obvious from the Court's statements regarding dismissal on October 31, 1997, due to lack of Plaintiff's expert report. Therefore, Plaintiff wholly objects to the obtaining of documents that are not relevant. Moreover, the production of documents have [sic] been obtained without proper authorization from Plaintiff.

4. Plaintiff further reserves all objections for an appeal of this cause due to said dismissal.

Respectfully submitted,

/s/ Veronica L. Davis
Veronica L. Davis

DEFENDANT'S EXHIBIT A

Veronica L. Davis

Attorney at Law
222 N. Mattson
West Columbia, Texas 77486
(409) 345-2953
(409) 345-5461 Telecopier

Marker's Business Records
13105 Northwest Freeway (Filed Nov. 4, 1997)
Suite 300
Houston, Texas 77040-6312

October 29, 1997

Re: Cause No. H-97-177; Veronica L. Davis vs. Syntex Laboratories, Inc. and Roche Bisociences; In the United States District Court for the Southern District of Texas

Dear Sir or Madam,

Please let this letter serve as your third notice that you are releasing my records without proper authorization. I advised your office by telephone and by facsimile transmission that no records of mine should be released at the request of Richard Jospehson [sic] or any other person from Baker & Botts.

First and foremost, you released my medical records without a medical authorization. I did not execute a medical authorization for the release of any records until September 16, 1997. Said authorization specifically prohibited the release of records prior to May, 1993. Moreover, said release failed to provide for the release of any personnel records or employment records.

Your office was previously noticed on September 15, 1997 of a pending Motion for Protective Order/Motion to Quash. Be advised further that this cause will be dismissed, according to the order of the Honorable Lynn Hughes on October 31, 1997. However, I intend to appeal all decisions and rulings heretofore made by the said Lynn Hughes.

Given the fact that you have disseminated medical records without an authorization and that this cause is set for dismissal, be advised that if any records pertaining to me are released to Baker & Botts, I will take **immediate legal action** against Marker's Business Records. Moreover, if further records are obtained by Marker's, in violation of my privacy rights, I will take legal action.

Consequently, any and all pending records requests should be denied, including but not limited to Lewis Gottlieb, Apolinar Dizon, John Delcambre, A.P. Beutel Center at Texas A & M University, Bureau of Reclamation, U.S. Department of Education, Dr. Sheryl Manning, Baylor University Medical Center Radiology Department, or any and all other entities that you have previously requested records from.

Thank you in advance for your immediate attention to this matter.

Sincerely,

/s/ Veronica L. Davis
Veronica L. Davis

CERTIFIED MAIL, RETURN RECEIPT REQUESTED No. P 210 373 336 and VIA FACSIMILE TRANSMISSION

(Logo) MARKER'S BUSINESS RECORDS, INC.
a MARKER-HOFF GROUP *Company*

November 24, 1997

Mr. Richard Josephson
BAKER & BOTTS (Filed Nov. 25, 1997)
910 Louisiana, Suite 3000
Houston, Texas 77002-4995

RE: Cause No. H-97-177; Veronica L. Davis vs. Syntex Roche Biosciences, Inc.

Dear Mr. Josephson,

Please be advised that Ms. Davis has not received the Notices of Intention to Take Deposition upon Written Questions issued for the following:

Texas Department of Human Services:	**Personnel records**
Eddie Matsu, M. D.:	**Medical records**

We sent Ms. Davis the above mentioned notices, via registered mail, on October 28, 1997. On November 17, 1997, the notices were returned to us because Ms. Davis did not claim them. I have attached a copy of the envelope returned to us for your records. As you can see, Ms. Davis received three notices informing her of such mail, which was sent to the same address that we had previously, successfully used for other notices.

Please advise me if I can assist you further with this manner.

Sincerely,

MARKER'S BUSINESS RECORDS, INC.

/s/ Sonya J. McCrory
Sonya J. McCrory

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VERONICA L. DAVIS,	§	
	§	
Plaintiff	§	H-97-177
VS.	§	
SYNTEX LABORATORIES, INC.	§	(Filed Nov. 7, 1997)
& ROCHE BIOSCIENCES,	§	
	§	
Defendants	§	

NOTICE OF NON-ATTENDANCE FOR PRE-TRIAL CONFERENCE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, VERONICA L. DAVIS, and makes files this Notice of Nonattendance and in support thereof would show the following:

1. Plaintiff has filed a Motion to Disqualify the Honorable Lynn Hughes in the above and foregoing procedure pursuant to 28 U.S.C. § 455(a),(b)(1).

2. Plaintiff would show that the Court must rule on Plaintiff's Motion for Recusal prior to issuing any further orders in this cause.

3. Plaintiff would show that if the Court does not recuse itself, the Court has already determined that it would dismiss Plaintiff's cause of action, even though the Plaintiff has sought reconsideration of that ruling.

4. Therefore, Plaintiff finds that a pre-trial conference would serve no legitimate end.

5. Plaintiff would show that she has been subjected to such bias by the Court and wholly prohibited from offering information during pre-trial matters.

6. Plaintiff would show that after her last encounter with the Court on October 17, 1997, it was necessary to seek medical attention. Plaintiff does not wish to subject herself to same and finds that it is not in her best interests to appear.

7. Plaintiff would show that if the Court so requires that she will be available by telephone during the designated time set for the hearing.

WHEREFORE PREMISES CONSIDERED, Plaintiff again requests that the Honorable Lynn Hughes recuse himself from the instant case and disqualify himself as the Judge in all matters related to the instant cause, and make no further orders or hold pre-trial conferences until the Motion to Disqualify has been ruled on

Respectfully submitted,

/s/ Veronica L. Davis
Veronica L. Davis
Plaintiff Pro Se
222 N. Mattson
West Columbia, Texas 77486
(409) 345-2953

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Notice of Non-Attendance shall be sent to Baker & Botts by facsimile transmission on or before November 10, 1997.

/s/ Veronica L. Davis
VERONICA L. DAVIS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VERONICA L. DAVIS, Plaintiff, VS. SYNTEX LABORATORIES, INC., and ROCHE BIOMEDICAL LABORATORIES, INC., Defendants.	Civil Action No. H-97-CV-177 Houston, Texas November 10, 1997 4:00 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LYNN N. HUGHES
PRETRIAL CONFERENCE

APPEARANCES:

FOR THE DEFENDANTS:

Mr. Mark Walters
BAKER & BOTTS
910 Louisiana
Suite 3000
Houston, Texas 77002-9934
(713) 229-1234

COURT REPORTER:

GAYLE L. DYE, CSR, RMR
515 Rusk Room 8116
Houston, Texas 77002
(713) 250-5582

PROCEEDINGS RECORDED BY STENOGRAPHIC MEANS, TRANSCRIPT PRODUCED FROM COMPUTER-AIDED TRANSCRIPTION

[P. 2] PROCEEDINGS

November 10, 1997

THE COURT: Veronica Davis versus Syntex Laboratories.

MR. WALTERS: Mark Walters for Syntex, Your Honor.

THE COURT: Mr. Walters, have you see Ms. Davis?

MR. WALTERS: I have not, Your Honor. On the way here, I stopped by my office to pick up my mail; and I had a fax that was a – it says it's a notice of non-attendance for pretrial conference.

THE COURT: May I – I don't think I got that. May I see that, please?

MR. WALTERS: Yes, Your Honor.

THE COURT: According to the transmittal data, it was sent from 409-345-5461 at 12:18 p.m., November 10, 1997, from a machine that imprints the name Veronica L. Davis.

One would assume that her machine is on semi-daylight savings time since you – your machine received it at 11:39.

MR. WALTERS: I have no explanation for that, Your Honor.

THE COURT: Like I say, I don't know whether this was sent; but I would like to make a copy of it and file it. Before getting that facsimile transmission about noon today, Mr. Walters, you had no further contact with Ms. Davis?

[p. 3] MR. WALTERS: No, Your Honor. The only point I'd bring to the Court's attention is at the last hearing on October 17, among other things, the Court denied Ms. Davis's motion to quash our outstanding subpoenas for her medical records and ruled that those would go forward and she was to pay the costs of executing those subpoenas.

Subsequent to that, she sent a letter to our records service threatening legal action against them if those subpoenas were executed.

THE COURT: Do you have a copy of that?

MR. WALTERS: I do. And we filed a motion to dismiss, I think, last week; and it's attached as an exhibit to that motion, as Exhibit –

THE COURT: Okay. If it's in the record, that's fine.

MR. WALTERS: It is. But I have an extra copy here as well. And so, we asked in our motion for dismissal – this is – we've had several months of passive non-compliance with the Court's orders. This is a step to actively frustrate our ability to implement what the Court has told us to do.

THE COURT: Since that's in the file, I'll return that to you. I'm hesitant to put you to the trouble of coming back for another hearing, but I think prudence

suggests that we take up not only the matters that should [p. 4] have been taken up today but all the additional matters, including her failure to appear today, on December 4th when that hearing – additional hearing was set.

But I guess so that there's no confusion on her part about the extent of my authority, I will enter a written order denying the recusal since she seems to be laboring under a misapprehension about the effect of her motions on her responsibilities and my obligations.

MR. WALTERS: So, we don't need to respond to that motion to recuse?

THE COURT: No, sir.

MR. WALTERS: Thank you.

THE COURT: If Courts were recusable for errors of law, we would all be recused.

All right. You may be excused. Thank you, Mr. Walters.

MR. WALTERS: Thank you, Your Honor.

(Proceedings concluded at 4:04 p.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

1-27-98 /s/ Gayle L. Dye
Date Gayle L. Dye, CSR, RPR, RDR

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VERONICA L. DAVIS, Plaintiff; vs. SYNTEX LABORATORIES, INC., Et al, Defendants.	)	CIVIL NO. 97-177 Houston, Texas 12/04/1997 3:30 P.M.

HEARING

BEFORE THE HONORABLE LYNN N. HUGHES
UNITED STATES DISTRICT JUDGE

FOR THE DEFENDANT: MARK WALTERS

Court Reporter: Anne Traylor, CSR, RPR
Official Court Reporter
515 Rusk, Room 8016
Houston, Texas 77002

PROCEEDINGS REPORTED BY MECHANICAL STENOGRAPHY TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

[p. 2] THURSDAY, DECEMBER 4, 1997 3:30 P.M.

THE COURT: A nice gentlemen is on the way to deliver to you, Mr. Walters, a copy of this, inch and a quarter application for a writ of mandamus by Ms. Davis.

As that was being delivered, I had my secretary telephone Ms. Davis and asked her whether she intended to appear; and she said, having been reached in West Columbia, that she did not intend to appear and she didn't believe she should have to appear as long as the application for a writ of mandamus was pending before the Court of appeals.

I am sorry that that puts Syntex to the additional cost of responding, but there is obviously nothing I can do to persuade Ms. Davis to follow the rules or my orders or otherwise responsibly to pursue this claim.

Today we got her motion for a reconsideration, and I believe that Syntex also has a motion to dismiss.

MR. WALTERS: That's correct, Your Honor.

THE COURT: I find this very frustrating. Do you have any suggestion other than having countenance to her disobedience for about three or four months? I told her in October 17th that I would dismiss it if she didn't get with the program. After that she began threatening your subpoena service with legal action.

[p. 3] MR. WALTERS: That's correct.

THE COURT: Do you have any suggestions?

MR. WALTERS: Nothing other than dismissing the case, Your Honor.

THE COURT: I already said I'm going to do that, and of course –

MR. WALTERS: I think we asked in our motion, given, besides not complying with the Court's order, given these other acts, threatening the records service –

THE COURT: Willful nonappearance in two different hearings.

MR. WALTERS: Yes.

THE COURT: This one, so that the record is clear, as lawyers always say, this one was reset at her request, remember?

MR. WALTERS: I think that's correct, Your Honor. I know she got a notice of it because she sent me a copy of the –

THE COURT: Now, did she – at some point she called saying that she's not well and needed to reset. I don't know that – I don't know which hearing it was, but talking to my staff, she did not – oh, November 7th she filed, the date, a notice of nonattendance with pretrial conference.

MR. WALTERS: Correct.

[p. 4] THE COURT: And indeed she did not appear. Maybe this one was a recent –

MR. WALTERS: We had asked in our motion given these other acts, that the dismissal be with prejudice and also ask for costs of attorney fees.

Beyond that I don't know what other kind of, anything else that the Court as I think is – I don't know what other suggestions we could make to –

THE COURT: Well, you know, before you impose the death penalty, as people say, you should work hard to assure yourself that no lesser penalty would suffice.

In this case on a couple of occasions, the complications of this kind of claim had been discussed with Ms. Davis, and what was required to connect Syntex's substance to her condition was discussed.

At those occasions, the entries in her medical records which appeared to disclaim the very connection that she was asserting were discussed, all in an effort to focus both counsel on what truly needs to be done in the case rather than traditional standard discovery.

She has repeatedly refused to produce the information peculiarly within her knowledge, has categorically refused to obey orders to furnish records and identify people, and has not, of course, produced an expert's report or identified any expert who makes the connection of [p. 5] her identification of her medical service providers, as we discussed with her once before, is wholly inadequate.

She is sometimes sick but she's not too sick to produce notices of nonappearance, repetitive motions to recuse, all based on my inability to read the rules of civil procedure, including this inch and a quarter stack of stuff and her refusal to attend hearings.

Frequently, in these kinds of cases, the Court is put in the dilemma of ascertaining whether we're dealing with client recalcitrants or counsel's recalcitrants. Here that dilemma is solved because patient and doctor are the same, and it is clear to me that Ms. Davis has a peculiar view of her responsibilities as a client, and independently as counsel. She has failed in both of those duties after, what I believed to have been, polite, patient reexplanations of her responsibilities.

The only response that Syntex or the Court has received from the attempt to manage this litigation so we could dispute and resolve the problems that actually occurred has been unilateral assertions that she's not going to comply, not going to attend, not going to pay for, not going to produce, and perhaps the most egregious, is to threaten suit against what amounts to a clerical service retained by your firm.

Noncooperation comes naturally to some folks [p. 6] with not much effort. In those instances she actively asserted, as a lawyer and client, a cause of action against people who didn't, people who are not responsible for the actions that they were about to take, and who in any event had not done anything wrong if they had done everything they had been asked to do.

That's one step, one small step about willful destruction of evidence. It increases the costs, of course, and reduces the likelihood that Syntex will see the evidence that will make it clear one way or the other that it might be responsible for her illness.

I am going to dismiss the case with prejudice. I am not going to assess costs and fees, not because I have not concluded you're not entitled to them, or Syntex is not entitled to them, but because I believe that it would simply exacerbate the transaction costs, and you would be spending more of Syntex's money and more judicial time trying to enforce or collect that adjustment of the cost than it would ever be worth to you.

So I concluded that you're entitled to costs. I will, of course, assess the Court costs against her, but I'm not going to order attorneys fees and all the other – because

you'll never see it. And I'll allow you to argue wide and long about that.

Do you see any utility to that at all?

[p. 7] MR. WALTERS: Well I think that you can – you may well be right about the ability to collect them. I think given these circumstances where we've pled for them, it might – if Your Honor concludes that we are in fact entitled to them, I think we'd like to have the order; and then at some point down the road, when it's appropriate, we can, we can look into that a little more.

And Your Honor may well be right. It may not be worthwhile, and you may just make that decision.

THE COURT: Do I have what the bills were, say, for the copy service?

MR. WALTERS: We haven't filed the bill of cost yet or an affidavit of attorneys fees.

THE COURT: All right, well, do that, promptly, and I will liquidate them. Maybe that gives you something to give up, but just make it a cost adjustment and not, you know, punitive.

MR. WALTERS: Right, I understand.

THE COURT: Even though this is the kind of case where punishment has been earned. So if you will get me that, please, sir.

MR. WALTERS: I will do it, Your Honor.

Anything else, Mr. Walters?

MR. WALTERS: I don't believe so, Your Honor.

THE COURT: Thank you.

[p. 8] (Proceedings concluded.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings i the above-entitled matter.

1/22/1998

/s/ Anne Traylor
Anne Traylor, CSR, RPR.